IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE NO. 242 OF 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
M/S. SHARP REFILLS CO. PVT.LTD. - Respondent(s)

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Appearance :
SMT. MONA M. BHATT for SHRI MANISH R. BHATT for Applicant(s).
NONE for Opponent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 02/08/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Smt. Mona M. Bhatt, learned Counsel for the

Revenue, is heard. None for the opponents though the Office Report shows that the Notices are served upon the opponents.

2. At the instance of the Revenue, the following questions have been referred by the Tribunal for our answer:

> *"Whether the Appellate Tribunal is right in law and on facts in canceling the interest charged u/s 215 of the Act when the amended provision came to be applied with effect from 1985-86 onwards and were clarificatory and procedural in nature?"*

3. The facts necessary for disposal of the present Reference are that the original assessment was made under Section-143(3) of the Income Tax Act ("the Act" for short) on 24/05/1987 on an income of Rs.7,41,790/-. In the said assessment order, a direction was given for charging interest perhaps under Section-217 (according to the Tribunal, the section referred to in the assessment order was not legible in the photocopy of the original assessment order). In the fresh assessment order passed pursuant to the order made by the Commissioner of Income-

Tax under Section-263 of the Act, the Assistant Commissioner directed levy of interest under Section 215/216 at a higher rate. The Commissioner of Income-Tax (Appeals) confirmed the order levying the additional interest. The matter went upto the Tribunal. It was contended before the Tribunal that the provisions of Section-215(3) of the Act were substituted with effect from 01/04/1985, the amendment provided for a hike in charging the interest and under Section-215(3), after its amendment, the authority could charge additional interest, in view of enforceability of the amendment with effect from 01/04/1985, it was contended before the Tribunal that the assessment or reassessment under Section 143/144 and fresh assessment in accordance with the directions issued under Section-263 being different connotations, the authorities were not justified in charging higher interest exercising the powers conferred upon them under Section-215(3), as amended. The Tribunal observed that in view of the enforceability of the said amendment under Section-215(3) of the Act, the extra interest could not be charged and the Revenue would not be entitled to charge any interest beyond what has been charged in the original assessment proceedings.

4. The decision of the Tribunal, not being

palatable to the Revenue, they made a Reference Application, which was allowed and the question afore quoted has been referred to this Court.

5. Smt.Bhatt, learned Counsel for the Revenue, submits that the enforceability could not be taken to be from 01-04-1985 only, but, that was to apply to all pending proceedings and in this case, as fresh assessment was to be made in accordance with the orders passed by the Commissioner of Income Tax (Appeals), in his revisional jurisdiction, under Section-263, in the year 1992, the amended provisions were in the statute book and were applicable to the fresh assessment proceedings, the Revenue was justified in charging additional interest and the Tribunal was absolutely unjustified in deleting the said addition. In the matter of ***Commissioner of Income-Tax vs. Multimetals Ltd.***, [***187 I.T.R. 98***], the Rajasthan High Court was confronted with almost an identical question. In the said matter, the assessment of the assessee was for the Assessment Year 1977-78, it was finalised and no interest was charged under Section-215. Subsequently, the Commissioner of Income-Tax, acting under Section-263, directed the Income Tax Officer to include the refund of excise duty received by the assessee as an income of the assessment year 1977–78. The

said amount was shown by the assessee as income in the assessment year 1979-80. The Income Tax Officer thereafter passed an order of fresh assessment under the Commissioner's direction and charged interest under Section-215. The assessee contended before the authorities that the interest could not be charged under Section-215 and applied for rectification of the mistake. The application was rejected by the Inspecting Assistant Commissioner but the Commissioner of Income-Tax allowed the appeal of the assessee and held that the Inspecting Assistant Commissioner was not justified in rejecting the application of the assessee under Section-154. The Commissioner also held that the interest under Section-215 was wrongly charged on the basis of the order passed by him under Section-263 of the Act. The said order was confirmed by the Tribunal and the application for reference came to be rejected by the Tribunal, therefore, the Revenue came to the High Court under Section-256(2) of the Income Tax Act. The Rajasthan High Court observed that there is a remarkable distinction between Section-2(8) of the Act, which defines “assessment” as “assessment includes reassessment” and Section-2(40) of the Act, which defines “regular assessment” as “the assessment made under Section 143 or 144”. The High Court also observed that the words “fresh assessment” as used

in Section-263 has not been defined under any of the provisions of the Income Tax Act.

Every word may not have a fixed connotation or meaning in all cases. The words “assessment”, “reassessment”, “fresh assessment”, may be of variable import and may carry different meanings depending upon the context in which the words have been used. The very fact that under Clause-40, “regular assessment” has been defined and it has been limited only to the assessment made under Section 143 or 144 of the Act. Under Clause-8 of Section-2, the word “assessment“ has been defined and reassessment has also been included in the definition of the word “assessment”.

In the said matter of ***Multimetals Ltd.*** (*supra*), the High Court ultimately observed that any assessment made in pursuance of the directions issued by the Commissioner under Section-263 in his revisional jurisdiction cannot be said to be an assessment under Sections 143 and 144 of the Income Tax Act, but should be limited to an assessment under Section-263 under the directions of the Commissioner of Income Tax. The High Court also observed that the assessment so made under Section-263 of the Act cannot be said to be a regular

assessment within the purview of Clause-40 of Section-2, but is an assessment within the purview of Clause-8 of Section-2 of the Income Tax Act. The High Court observed that interest under Section-215 could not be charged in the proceedings initiated in accordance with the directions issued under Section-263 of the Act.

6. In the present matter, it is also to be seen that the provisions, which became effective from 01-04-1985, are virtually penal in nature, they allow the authorities to charge additional interest on the lapses committed by the assessee. If prior to 01-04-1985, the assessment is completed and the assessment order is framed, then, such assessee would not be answerable to additional charge of the interest, but, in a given case, for some reason or the other or because of delay on the part of the Assessing Officer if the proceedings are not completed and the assessment order is not framed, then, the submission made by the Revenue if is accepted, then, it would give handle in the hands of the Revenue to charge additional interest taking shelter under Section-215(3) of the Act. It is trite law that the the penal provisions would not have retrospective effect and if the assessment made under Section-263 is not a regular assessment, which includes reassessment, then, the

amended provisions would have no application. The Tribunal was absolutely justified in holding that the amended provisions of Section-215(3) of the Income Tax Law could not be applied to the proceedings initiated and ultimately concluded in accordance with the directions issued by the Commissioner of Income Tax in his revisional jurisdiction under Section-263 of the Act.

7. During the course of arguments, it was also submitted that the provisions were clarificatory, therefore, the clarification would be applicable with all its prefixes and suffixes. The argument is in oblivion of the fact and the legal position that a clarification simply explains what is already available. A clarification cannot delete or add anything to the substantive provisions. In the present matter, the clarification virtually clothed the authorities with an additional power. If the original provisions did not confer the said power on the authority, then, such power could not be conferred by way of a clarification. The argument is not worth acceptance. It is also rejected.

8. We would also be justified in placing our reliance upon a judgement of the Apex Court in the matter of ***Modi Industries Ltd. & Ors. vs. Commissioner of***

Income-Tax & Anr., [***216 I.T.R. 759***]. In the said matter, the Supreme Court had observed that the words “regular assessment” in Section-214 would mean original assessment made under Section 143/144 of the Income Tax Act. The Supreme Court has also observed in the said matter that with effect from 1st April, 1985, interest payable under Section-214 will increase or decrease in accordance with the variation in the quantum of the excess payment of tax brought about by orders passed subsequent to the regular assessment as mentioned in Sub.Section-(1A). This observation would squarely cover the case on hand because present is not a case of regular assessment, but is a case of fresh assessment in accordance with the directions made under Section-263 of the Act.

9. For the reasons aforesaid, we hold that the Tribunal was justified in deleting the addition of the additional interest. The Reference is answered against the interest of the Revenue and in favour of the Assessee.

10. Before parting with the case, we must inform the Tribunal that while making a Reference, it should see that the papers referred to the High Court must be legible and the Tribunal should not leave everything in

the hands of some Clerk or a peon. In the present matter, the order passed by the Tribunal is illegible and the photocopy of the same is absolutely worthless. When we invited the attention of the learned Counsel of the Revenue to this fact, she tendered an apology, but, however, submitted that with her best efforts, a typed copy was filed, but, some of the words could not be recognised. The Tribunal shall take into consideration the observations made aforesaid at the time of making the Reference.

A copy of this judgement be sent to the learned Vice President of the Tribunal for its due observance.

[***R.S.Garg, J.***]

[***M. R. Shah, J.***]

*kamlesh**